The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bell and Howell Company

File: B-231617

Date: October 6, 1988

DIGEST

Protest against the issuance of a delivery order to a higher-priced multiple-award Federal Supply Schedule (FSS) contractor by protester with similar FSS contract is denied where contracting officer reasonably relied on information contained in the FSS listings which failed to include the protester as a potential source of supply for the equipment.

DECISION

Bell and Howell Company protests the award of a purchase order to Eastman Kodak Company by the United States Army, Fort Bliss, Texas under request for quotation (RFQ) No. DABT51-88-Q-4047 for a computer assisted automated retrieval system (CARS). The Army is a mandatory user of the General Services Administration (GSA) Federal Supply Schedule (FSS) contracts that cover this type of equipment and award was made to Kodak under its FSS contract. Bell and Howell contends that its equipment meets the Army's needs and, as the lowest-priced vendor, it should have received the award.

We deny the protest.

The facts surrounding the acquisition of this equipment are generally not in dispute. In 1984 and 1985, the Army studied, evaluated and tested various CARS and concluded that Bell and Howell and Kodak had acceptable systems. At that time, however, it apparently was not in a position to proceed with the purchase. During 1986 and 1987, the agency sought approval and funding to purchase the CARS. Funds did not become available until fiscal year 1988.

On February 23, 1988, the Army issued an RFQ for the CARS to the three potential sources, including Kodak, listed in the October 15, 1987, cumulative edition of the GSA schedule.

043480/137001

Bell and Howell was not listed as a source, we now know, because of a clerical error by GSA. Kodak was the only firm that responded. A purchase order was issued to Kodak on April 22, 1988, based on the contracting officer's determination that Kodak's equipment would meet the agency's requirements. Delivery of the CARS was required no later than June 15.

On May 11, Bell and Howell called the contracting agency, inquired as to the status of the CARS procurement, and was told that a purchase order had been issued to Kodak. The following day, Bell and Howell filed an agency-level protest against the award on the basis that the firm was improperly excluded from the procurement even though it offered lower-priced equipment conforming to the minimum essential needs of the agency. Bell and Howell requested that the Army cancel the purchase order issued to Kodak and make an award to it. On May 16, the contracting officer denied Bell and Howell's protest, stating that the firm was not solicited for this acquisition because it was not listed in the GSA schedule as a potential supplier at the time the RFQ was issued. This protest followed.

Bell and Howell advances several arguments in support of its position that the contracting officer erred in placing an order for this equipment under a GSA schedule contract with an offeror other than the low-price offeror. First, Bell and Howell claims that the contracting officer knew, as early as May 1987, that Bell and Howell's equipment could meet Fort Bliss' requirements and was considered an acceptable source of supply. In support of this contention, the protester has furnished this Office with documentation it obtained from Fort Bliss from which it concludes that the contracting officer should have known that the Army had identified Bell and Howell as the preferred source of supply. On this basis, the protester alleges that the contracting officer should have inquired of Bell and Howell whether it had a GSA schedule contract rather than assume, on the basis of an FSS listing which incorrectly failed to list the firm as a potential supplier of this equipment, that it did not have one.

Second, Bell and Howell argues that when the contracting officer learned that the firm did indeed have a GSA schedule contract, she improperly failed to suspend performance of Kodak's contract pending resolution of its protest. According to the protester, on May 12, 1988, the contracting officer was furnished evidence that Bell and Howell had the requisite GSA schedule contract; on May 23, a GSA attorney confirmed that Bell and Howell had a schedule contract and

reportedly advised the contracting officer that notwithstanding the omission of Bell and Howell from the FSS listings, the firm should receive the award if its equipment could meet the agency's needs since it was the lowest-priced supplier. In addition, Bell and Howell asserts that as of that date, Kodak had not shipped the equipment. Thus, in its view, the contracting officer had adequate time to effect appropriate corrective action but she failed to do so. Instead, the agency compounded its error by accepting delivery of Kodak's equipment on June 10 and sometime thereafter the equipment was installed. Although the protester is aware that the agency is using the Kodak system, it nonetheless argues that we should order the contracting officer to terminate Kodak's contract and make an award to the protester for the supply of its system.

In its report on the protest, the Army maintains that because it was required to purchase the CARS through the FSS, the agency could only solicit the potential sources listed on the GSA schedule. Since Bell and Howell was not listed thereon and Kodak was the only vendor that responded to the RFQ, the agency asserts that award could only be made to Kodak. The Army explains that when it learned that Bell and Howell was erroneously omitted from the FSS listings, it did not suspend performance of the contract since Bell and Howell's agency-level protest was filed more than 10 days after award. Finally, the agency asserts that since the award to Kodak was proper, termination of the contract is not warranted nor is it practicable because Kodak's equipment has been accepted and is presently in use.

The Federal Property Management Regulations (FPMR) which govern purchases from the GSA's multiple-award FSS provides that, where as here, there is a mandatory FSS in effect, an agency is required to purchase its requirements from that schedule if its minimum needs will be met by the items listed on the schedule. 41 C.F.R. § 101-26.401 to 401-1 (1987). Here, the protester does not dispute that the equipment at issue was a mandatory FSS item nor dispute that the October 15, 1987 FSS listings failed to include the firm as a potential source of supply. Nonetheless, the protester argues that it was incumbent upon the contracting officer to ascertain the firm's status as an acceptable source given that the Army had tested its equipment and determined that it would satisfy Fort Bliss' requirements.

We do not think the circumstances of this case warrant sustaining Bell and Howell's protest. We note the testing and evaluation of these systems took place several years before the funds for their purchase actually became available. Although Bell and Howell states in general terms

that it marketed its system at Fort Bliss for "many months," it makes no claim of having advised Fort Bliss officials that it held an FSS contract. Even if we assume that the contracting officer was aware that the Bell and Howell system had been found acceptable, there does not appear to have been presented to the contracting officer any information that Bell and Howell was an FSS contractor and--as we have indicated above--the FSS listing which the contracting officer did consult did not include Bell and Howell.

Our decisions recognize some obligation on the part of the FSS contractor to advise contracting officials of the firm's FSS status. In our decision B-164661, Aug. 26, 1968, an agency procured certain laboratory equipment through a competitive solicitation after a check "of all information available in the contracting office as to whether [equipment] of a similar nature [was] on [a schedule contract]" proved negative. After the competitively bid contract was awarded, a manufacturer protested on the basis that it offered equivalent equipment under a schedule contract. In response to the contracting officer's inquiry, GSA verified the manufacturer's assertion that its equipment had been placed on a GSA contract 4 days before the protested solicitation was issued. However, notification thereof was in an amendment to the schedule which was still being processed. In fact, we noted that even as of approximately 2 weeks after the protest was filed, the amendment "had not been received by the contracting agency involved, nor had any [GSA] catalogs been received from [the protester]." We also noted that the awardee and one other bidder on the competitive procurement, even though they were dealers of the protester's products, offered another manufacturer's product apparently because they were unaware that the protester's product was covered by a federal supply contract. Under these circumstances, it being clear that the procuring activity was not aware that the protester's product which would meet its needs was available under a GSA FSS contract, we denied the protest.

Here, as in B-164661, supra, even though the protester's product was covered by an FSS contract at the time of the procurement, that fact was not apparent from the GSA literature available to the procuring activity, and neither the protester-manufacturer nor its dealers had provided the procuring activity with any GSA catalogs.

In Dictaphone Corporation, 58 Comp. Gen. 234 (1979), 79-1 CPD ¶ 49, a vendor under an FSS contract complained that its "top of the line" equipment had been compared with its competitor's "middle of the line" equipment even though the procuring activity had been apprised shortly before award

that the protester also offered a "middle" line more comparable to that of its competitor. Because the record showed that shortly before award the procuring agency was aware that the protester offered "middle of the line" equipment, we stated that the agency should have attempted to obtain information from the GSA or the protester about that equipment to see if it would satisfy the agency's minimum needs. However, we concluded:

> ". . . since the vendor should have advised the agency of its middle of the line equipment earlier in the procurement process and the offered equipment has met the agency's needs and has been delivered and installed, the award will not be disturbed."

Here, it is undisputed that because of an error by GSA, Bell and Howell was not listed as having an FSS contract for this equipment. We recognize that there may be instances where the circumstances of a particular procurement would support a finding that the contracting officer nevertheless should have known or reasonably be expected to know that a potential source is an FSS contractor. In this case, however, even though it appears that at one time in the past Bell and Howell's equipment had been tested and evaluated, there is no evidence in the record before us that prior to the award to Kodak either Bell and Howell or its representative for the Fort Bliss area supplied the procuring activity with catalogs or other information concerning the existence of an FSS contract. Therefore, we think the information available to the contracting officer was not adequate to reasonably put her on notice that the FSS listing which she did consult did not include Bell and Howell. The protester has not shown that reliance on the information in the FSS listings was unreasonable save to argue that the contracting officer should have inquired if the firm had the requisite schedule contract. Furthermore, Bell and Howell does not argue, and it otherwise does not appear, that the contracting officer intentionally sought to exclude Bell and Howell from the procurement. As a result, we see no basis on which to disturb the award.

In any event, while recognizing that the failure to include Bell and Howell on the FSS listings was an error by GSA, we are not aware of any statute or regulation which requires a contracting officer to verify the accuracy or completeness of the FSS listings. In so holding we are mindful of the

need for GSA to ensure that its publication of the FSS accurately lists all contractors that hold FSS contracts for the various products and services covered by the schedule.

The protest is denied.

James F. Hinchman
General Counsel